Supreme Court, U.S.
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No. 051573

IN THE

United States Supreme Court

PT PERTAMINA (PERSERO), f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Henry Weisburg
Counsel of Record

Panagiotis Katsambas
SHEARMAN & STERLING LLP
Attorneys for Petitioner
599 Lexington Avenue
New York, New York 10022
(212) 848-4000

Counsel for Petitioner

Dated: June 7, 2006

QUESTION PRESENTED

In interpreting foreign law, do principles of comity and the requirements of Rule 44.1 of the Federal Rules of Civil Procedure mandate that a federal court give respectful consideration and substantial deference to a foreign sovereign's own interpretation and explanation of the substance of its domestic laws?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner PT Pertamina (Persero) is wholly owned by (but a separate juridical entity from) the Government of the Republic of Indonesia.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption of the decision of the United States Court of Appeals for the Second Circuit, Pet. App. 2a, except that Petitioner became a limited liability company under Indonesian law as of September 18, 2003, and is now named PT Pertamina (Persero).

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Petitioner Pertamina PT (Persero), f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") respectfully petitions this Court for a writ of certiorari to review the judgments in this action of the United States Court of Appeals for the Second Circuit.[1]

OPINIONS BELOW

The summary decision of the United States Court of Appeals for the Second Circuit, which was not published in the federal reporter, appears in the Appendix of the Petition ("Pet. App.") at 1a-5a. The judgment of the United States District Court for the Southern District of New York appears at Pet. App. 6a-13a ("Final Judgment"). The Second Circuit's December 10, 2002 Opinion is reported at 313 F.3d 70 and appears at Pet. App. 92a-130a. The district court entered numerous related orders, which appear at Pet. App. 14a-82a, 89a-91a, and 131a-137a.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its final judgment on March 10, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 44.1 of the Federal Rules of Civil Procedure provides, in relevant part: "The court, in determining foreign

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[1] Pertamina also supports the arguments made by the Ministry of Finance of the Republic of Indonesia in its petition for a writ of certiorari from the Second Circuit's decision, which, Pertamina understands, is also being filed today.

law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law."

STATEMENT OF THE CASE

In its decision below, the United States Court of Appeals for the Second Circuit summarily affirmed the district court's judgment, holding, among other things, that the Petitioner owned the Refinery Revenues (as such term is defined below) and that, therefore, those funds were subject to execution by the Respondent (hereinafter referred to as "KBC"). In doing so, the Second Circuit, as well as the district court, completely disregarded applicable Indonesian law, which, indisputably, governs the question of ownership of the funds in the Refinery Accounts.

Background Of The Dispute

The Indonesian Constitution and the laws of Indonesia establish that the Government of Indonesia (the "Government") is the exclusive owner of the nation's natural resources, which it must exploit only for the benefit of the Indonesian people. Pet. App. 95a. Pertamina is an oil and gas company owned and controlled by the Government. *Id.* It engages in oil and gas exploration, extraction, processing, marketing, transportation and distribution. *Id.* In November 1994, KBC entered into two contracts—a "Joint Operation Contract" and an "Energy Sales Contract"—with Pertamina and another Government-owned entity, Persero ("PLN"). Under the contracts, KBC was to develop geothermal energy extraction facilities in the Karaha

area of West Java, Indonesia. *Id.* at 96a. KBC had not begun to build a power plant, nor even obtained the necessary financing, when the Asian economic crisis of 1997-98 struck Indonesia. In 1997 and 1998, after the Indonesian Rupiah lost value against the dollar (which made it impossible for public and private entities to meet their dollar-denominated obligations) and at the insistence of the International Monetary Fund, former Indonesian President Suharto suspended the KBC project. Pertamina had nothing to do with the suspension of the project. *Id.* at 97a.

KBC initiated an arbitration under the two contracts in 1998, and, on December 18, 2000, the arbitral panel issued a $261 million award against Pertamina and PLN. *Id.* at 98a. There were serious flaws in the procedures relating to the arbitration (including the selection of arbitrators and consolidation of arbitrations) as well as the award issued by the panel. For example, the panel found that Pertamina had breached the contracts with KBC, but it did not identify any substantive provisions of the contracts that were violated, nor did it discuss the relevant Indonesian law governing the contracts. With regard to the lost profits portion of the award (which amounted to $150 million), KBC had admitted that it could not have raised the required third-party non-recourse financing for the power plant because of the economic crisis. The panel, however, found that one of KBC's American parents would have put $500 million into the project, even though there was no contemporaneous evidence to support KBC's assertion and the panel effectively denied Pertamina's request for discovery on the issue.

Proceedings In The United States

KBC moved for confirmation of the arbitration award before the United States District Court for the Southern District of Texas (the "Texas Court"). Pertamina opposed confirmation based on the numerous defects in the award, but the Texas Court confirmed the award in December 2001 and entered judgment against Pertamina in the amount of $261 million plus 4% interest per annum.

After registering the Texas Court's judgment in New York in February 2002, KBC moved for ex parte writs of execution before the United States District Court for the Southern District of New York (the "New York Court") pursuant to N.Y. C.P.L.R. § 5222(b). Pet. App. 99a-100a. The New York Court issued writs of execution authorizing KBC "to execute upon any property of Pertamina within this jurisdiction in satisfaction of the [Texas Court's judgment]." *Id.* (emphasis added). The New York Court issued restraining notices that KBC served on Bank of America and Bank of New York, among others. In response to those restraining notices, Bank of America restrained funds in excess of $270 million in twenty-two trust accounts that were in Pertamina's name. Pet. App. 62a.

The Retention Fees

Pertamina and the Ministry of Finance of the Republic of Indonesia (the "Ministry") opposed the writs of execution and moved to quash the restraining notices in March 2002. In an order dated April 24, 2002 (the "April 2002 Order"), the New York Court partially granted the motions and held that the only property that could be restrained was that portion of the funds in fifteen trust accounts at Bank of America (what came to be known as the "Adjudicated

Accounts") that constituted Pertamina's "Retention Fee." Pet. App. 135a at ¶¶ 11-15. The Second Circuit affirmed the April 2002 Order in December 2002 (the "December 2002 Opinion"). Pet. App. 130a.

The Retention Fee arises from the following mechanism adopted by the Indonesian Government: in fulfilling the Government's responsibility to exploit Indonesia's natural resources for the benefit of its people, Pertamina entered into Production Sharing Contracts with private contractors who had the responsibility for development, production, transportation, and marketing activities relating to natural gas production in specified geographic areas. Pet. App. 100a-102a. The contractors delivered the extracted natural gas to Pertamina, which, in turn, transported it for domestic sale or for conversion into liquefied natural gas ("LNG") at liquefaction plants. Pertamina sold the LNG to foreign buyers, who remitted payments to trust accounts in New York, such as the Adjudicated Accounts. *Id.* In accordance with the agreements relating to each such account, the bank trustee was first required to make payments for debt service, production costs and trustee expenses. *Id.* The excess amount in the accounts, referred to as the Net Operating Income, was then distributed to Pertamina and the private contractor pursuant to the terms of the relevant Production Sharing Contract. *Id.* Pertamina's interest in the Net Operating Income was transferred directly to the Ministry's account with Bank of Indonesia, the Indonesian Central Bank, in Jakarta. *Id.* Pertamina was entitled to a fee, mandated by Indonesian law and calculated at 5% of the Net Operating Income transferred to the Ministry, which is the "Retention Fee." Pet. App. 135a at ¶ 14. The balance of those funds belonged to the Government.

Pursuant to the December 2002 Opinion, the New York Court was supposed to calculate the amount of the Retention Fees, so that the remainder of the funds in the Adjudicated Accounts could be released to the Government. The New York Court, instead of releasing the funds owned by the Government in accordance with the December 2002 Opinion and as required by the Foreign Sovereign Immunities Act (the "FSIA"), decided to secure KBC's judgment by using the funds restrained in the Adjudicated Accounts, irrespective of whether such funds constituted Retention Fees or property of the Government. Pet. App. 91a. Pertamina and the Government immediately appealed, but the Second Circuit dismissed the appeal for lack of finality. Pet. App. 83a-88a. The Second Circuit, however, reminded the New York Court that "no portion of the Ministry's funds can serve as security to satisfy the debt of Pertamina." *Id.* at 87a.

Subsequent to that opinion by the Second Circuit, the New York Court proceeded to the determination of the amount of the Retention Fees in the Adjudicated Accounts, and the ownership of funds held in the other accounts that had also been garnished, known as the Refinery Trust Accounts.

With respect to the Retention Fees, Pertamina and the Ministry argued that the restraining notices served in February of 2002 were ineffective as to Retention Fees passing through the Adjudicated Accounts after June 7, 2002, because of the fact that the amount already restrained through that date in the Adjudicated Accounts had reached the statutory cap under N.Y. C.P.L.R. § 5222(b) (twice the judgment amount). Pet. App. 177a-178a. Thus, according to Pertamina and the Ministry, and pursuant to the Decem-

ber 2002 Opinion, the New York Court was required to limit the amount restrained in the Adjudicated Accounts to the funds corresponding to the Retention Fees, and had to release the remainder to the Government.[2]

The New York Court disagreed and ruled that Retention Fees passing through—but no longer remaining in—the Adjudicated Accounts after June 7, 2002 should ***retroactively*** be "deemed to be withheld," and that the total amount of the restrained revenues in the Adjudicated Accounts were a "substitute for the withholding duty" of Bank of America with respect to the Retention Fees. Pet. App. 80a. In essence, the New York Court used a substitution of funds analysis not found in New York law and that, in this case, was in direct contravention of the FSIA provisions providing for immunity from execution for the assets of a foreign sovereign. The clear effect of the New York Court's rulings was that funds belonging to the Government were treated as Retention Fees belonging to Pertamina, and made subject to execution.

On May 19, 2004, the New York Court also ruled that an additional $132 million in Retention Fees had passed through in 2003, and ordered that they should also be "retroactively" restrained. In doing so, the New York Court ignored Indonesian laws that terminated Pertamina's

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[2] The amounts restrained by Bank of Amer[illegible] the Adjudicated Accounts were approximately $503 million. In June [illegible] 2002, the New York Court ordered Bank of America to release $226 million and continue to restrain $277 million on the theory that these funds were sufficient to cover the judgment entered by the Texas Court, along with interest. Pet. App. 72a. Of the $277 million that continued to be restrained, only a small portion comprised Retention Fees, and the balance belonged to the Government. *Id.* at 74a.

entitlement to Retention Fees as of January 1, 2003. Pet. App. 51a-52a.

The Refinery Revenues

The April 2002 Order focused on the Adjudicated Accounts and the Retention Fees and did not deal with funds restrained in another set of accounts, the Refinery Trust Accounts. However, in October of 2004, the New York Court determined that the funds in three accounts holding revenues from the export of petroleum products refined at Indonesian oil refineries (the "Refinery Revenues"), amounting to $452.7 million, belonged to Pertamina. The New York Court again ignored Indonesian law and Government directives establishing that the funds in the Refinery Trust Accounts were not property of Pertamina, but instead were property of the Government. The reasoning of the New York Court was that the Government did not take immediate possession of the Refinery Revenues and, therefore, did not own them.

Pursuant to Indonesian laws and its constitutional mandate, the Government has undertaken to ensure that oil-based fuels (referred to in Indonesian regulations as "BBM") are made available to all the people of Indonesia at a consistent price. Pet. App. 25a-26a. The Government has delegated this responsibility to Pertamina. *Id.* Pertamina produces and distributes BBM through the operation of Government-financed oil refineries on a "no-loss no-profit" basis. *Id.* at 27a. If the domestic supply of BBM products is insufficient to meet the demands of the Indonesian people, Pertamina imports BBM products on behalf of the Government. At the Government-financed refineries, Pertamina also produces non-BBM products (such as naptha

and lubricants) for domestic use and export. The Refinery Revenues are revenues that resulted from the export of non-BBM products. *Id.* at 26a.

To the extent the total cost of producing BBM exceeds the revenues from Pertamina's sales of domestic BBM, Indonesian law requires the Government to make up the difference to ensure that Pertamina does not suffer a loss. If, however, Pertamina's domestic BBM revenues exceed the total cost, Pertamina's "profit" must be transferred to the Government. *Id.* at 27a. The revenues from Pertamina's export and domestic sales of non-BBM products are used to reduce the total production costs in the BBM system, which either reduces the Government's subsidy obligation or increases the amount Pertamina must transfer to the Government. *Id.* Thus, the Refinery Revenues in the Refinery Trust Accounts constituted a central element of the Indonesian BBM system. Pertamina, acting as a trustee, used the funds in the Refinery Trust Accounts and listed them as income on its financial statements because it had the responsibility to account for them on an annual basis and maintain that accounting for the benefit of the Government. *Id.* at 28a-30a. But, under Indonesian law, it was not Pertamina's money.

The Second Circuit's Decision

In total, the New York Court "restrained and/or deemed restrained" approximately $776 million in Retention Fees and Refinery Revenues. Pet. App. 12a at ¶ 13. The New York Court ordered the turnover of $271 million (plus interest) to KBC from the $776 million restrained, but stayed the effect of its turnover order pending appeal. *Id.* at ¶¶ 15-16.

In reviewing the New York Court's Final Judgment, the Second Circuit stated that "a determination that the refinery funds [i.e., the Refinery Revenues] belonged to Pertamina would afford KBC full recovery." Pet. App. 4a. Based on this statement, the Second Circuit considered only the portion of the New York Court's Final Judgment that related to ownership of the Refinery Revenues.

The Second Circuit affirmed the New York Court's Final Judgment with respect to the ownership of the Refinery Revenues, holding that Pertamina had offered no evidence under Indonesian law supporting its contention that the Government owned those funds. Pet. App. 5a. That holding disregarded the Indonesian BBM regime, which governs the ownership of the Refinery Revenues at issue.

REASONS FOR GRANTING THE PETITION

CONTRARY TO WELL-ESTABLISHED PRINCIPLES OF INTERNATIONAL COMITY, THE SECOND CIRCUIT AFFIRMED A DECISION OF THE LOWER COURT THAT COMPLETELY DISREGARDED APPLICABLE FOREIGN LAW AS WELL AS THE FOREIGN SOVEREIGN'S EXPLANATION AND INTERPRETATION OF ITS DOMESTIC LAW, WARRANTING THE EXERCISE OF THE COURT'S SUPERVISORY POWER.

Comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation[.]" *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). It serves both to "promote justice between individuals" and "to produce a friendly intercourse between the sovereignties to which they belong[.]" *Id.* at 165. "[T]he federal judiciary has relied on principles of

comity and international law to protect foreign governments in the American legal system." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 97 (D.C. Cir. 2002). Courts invoke comity, for example, to enforce foreign judgments, whether issued by a civil or common law jurisdiction. *See, e.g., United States ex rel. Saroop v. Garcia,* 109 F.3d 165, 169 (3d Cir. 1997) (comity "creates a strong presumption in favor of recognizing foreign judicial decrees.") Such deference "fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations." *Id.* (citing cases).

This Court "ha[s] long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation." *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct.*, 482 U.S. 522, 546 (1987). For example, in *The Schooner Exch. v. McFaddon,* 11 U.S. (7 Cranch) 116 (1812) (mem.), this Court embraced, "[as] a matter of grace and comity on the part of the United States," the immunity of a foreign sovereign from suit in United States courts. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Conversely, short of war or some positive intervention by the political branches, comity also holds all U.S. courts open to foreign sovereigns, even those with which the Nation may have difficult relations. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 409 (1964).

The achievement of these "worthy goals of comity[,]" *Gen. Elec. Co. v. Deutz A.G.*, 270 F.3d 144, 160 (3d Cir. 2001), requires that the federal courts defer to a foreign sovereign's determination of the content of its own laws. Applying this principle, the federal courts have accorded

"substantial deference" to the "construction" a foreign sovereign "places upon its domestic law" when the foreign sovereign is a litigant. *In re Oil Spill by Amoco Cadiz,* 954 F.2d 1279, 1312 (7th Cir. 1992) ("A court of the United States owes substantial deference to the construction France places upon its domestic law."); *Access Telecom, Inc. v. MCI Telecomms. Corp.,* 197 F.3d 694, 714 (5th Cir. 1999) ("courts may defer to foreign government interpretations"). As courts have recognized, "[g]iving the conclusions of a sovereign nation less respect than those of [a U.S.] administrative agency is unacceptable." *In re Oil Spill by Amoco Cadiz*, 954 F.2d at 1312.

In fact, the Second Circuit, in its December 2002 Opinion, recognized the principle of deference to the position of a foreign sovereign in connection with the interpretation of that sovereign's laws. "Where a choice between two interpretations of ambiguous foreign law rests finely balanced, the support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas." Pet. App. 128a-129a.

In its summary decision affirming the New York's Court Final Judgment, however, the Second Circuit failed to adhere to, and follow, these principles. It completely disregarded Indonesian law and held that Pertamina owned the Refinery Revenues because they constituted "property within Pertamina's control, which only Pertamina controls." Pet. App. 5a. That conclusion ignored Indonesian law governing the relationship between Pertamina and the Government, the BBM system, and the Indonesian limitations applicable to Pertamina's use of the funds in the Refinery Accounts. Further, the Second Circuit's methodology reflected an inappropriate presumption that Indone-

sian law was comparable to New York law, and a reluctance to carry out a thorough examination of the relevant foreign law, as both comity and Rule 44.1 of the Federal Rules of Civil Procedure require.

According to the Indonesian laws establishing the BBM system, Pertamina is responsible for producing and selling BBM and non-BBM products for both domestic use and export. The Refinery Revenues were generated from the export of non-BBM products. The key aspect of the BBM system, however, is that revenues from both BBM and non-BBM products are factored into the monetary reconciliation between Pertamina and the Government, designed to make sure that Pertamina functions on a "*no-profit no-loss*" basis. Pertamina is not at liberty to use the Refinery Revenues (or, for that matter, revenues from the sale of other non-BBM or BBM products) according to its own wishes but, on the contrary, is required, under Indonesian law, to apply them as a cost-reducing factor in the BBM reconciliation between Pertamina and the Government. If the reconciliation results in a profit, that profit is taken from Pertamina and transferred to the Government. If the reconciliation results in a loss, the Government covers the loss. One way or the other, Pertamina functions on a "*no-profit no-loss*" basis. Therefore, any funds Pertamina receives from the sale of BBM or non-BBM products, such as the Refinery Revenues, it holds only on behalf of, and for the account of, the Government.

While Pertamina and the Ministry submitted detailed evidence regarding the Indonesian laws establishing the BBM system and how that system functions, the Second Circuit stated that Pertamina failed to point to any "Indonesian legal directive that deems the refinery funds

[i.e., the Refinery Revenues] Indonesia's[.]" Pet. App. 5a. That conclusion ignored the evidence submitted by Pertamina and the Ministry showing that, under Indonesian law, the Refinery Revenues were required to be contributed into the BBM system and constituted a cost-reducing factor in BBM cost price. Pet. App. 26a-27a. Moreover, based on these legal directives and contrary to the Second Circuit's holding, Pertamina could not "spend those funds for any purpose," but was obliged to apply the Refinery Revenues to the BBM monetary reconciliation with the Government. Pet. App. 5a. In short, the Second Circuit deprived the Government of the Refinery Revenues in that, under the BBM system, they were intended to either increase the Government's receipts from Pertamina or reduce Pertamina's loss and, therefore, the Government's subsidy of that loss.

Likewise, the Second Circuit's conclusion that "Indonesia acts like a guarantor of Pertamina's BBM operation" (*see* Pet. App. 5a), lacks any support or basis under Indonesian law, and betrays a false assumption that Indonesian law and New York law are analogous. Under Indonesian law, the Government owns the Refinery Revenues; and since the Government owns them, it cannot, at the same time, act "like a guarantor" for the BBM operation. This ill-fated presumption exemplifies the Second Circuit's misapplication of Indonesian law—a misapplication stemming from its refusal to defer to the Government's interpretation of its own law.

The decision below failed to take into account the regulatory regime governing the BBM system and Indonesia's exploitation of its natural resources. *See, e.g.*, *PPG Indus. v. Costle*, 659 F.2d 1239, 1246 (D.C. Cir. 1981) (holding

that when interpreting statutes of uncertain meaning, the Court of Appeals would "look principally to the language and structure of the regulatory scheme, and to the policies that underlie it"); *accord FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Contrary to the statement in its December 2002 Opinion that "the support of a foreign sovereign for one interpretation [regarding the sovereign's laws] furnishes legitimate assistance in the resolution of interpretive dilemmas" (*see* Pet App. 129a), the New York Court and the Second Circuit turned a blind eye to Indonesia's legal system and the views of the Government regarding the laws that it established to ensure the exploitation of its natural resources for the prosperity of its people. *See Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981) (recognizing "the principle of supreme state sovereignty over natural resources.")

If the Second Circuit had correctly applied the principles of comity, it would have deferred to the foreign sovereign and its well-founded and reasonable interpretation of its own laws. The principal force underlying the comity doctrine is reciprocity. The United States would and should expect that a foreign court hearing an issue regarding U.S. regulation, adopted to support an important national policy, would afford substantial deference to the views expressed by representatives of the U.S. Government with respect to the proper operation and construction of such regulation. *See Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 160 (3d Cir. 2001) ("Reciprocity and cooperation are worthy goals of comity."). Yet the Second Circuit's ruling, and its lack of deference for clearly articulated Indonesian law, opens the door for foreign courts to ignore the U.S. Government's views regarding

U.S. laws and to decide such issues based on that jurisdiction's unguided interpretation of U.S. law. This Court should exercise its supervisory power to eliminate this threat to the comity doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted, and the decision below reversed.

Respectfully submitted,

/s/ HENRY WEISBURG
Henry Weisburg
Counsel of Record

Panagiotis Katsambas
SHEARMAN & STERLING LLP
Attorneys for Petitioner
599 Lexington Avenue
New York, New York 10022
(212) 848-4000

Counsel for Petitioner

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